IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1686 OF 1995

Shri Balkrishna K.Mehta
having his address at C/o.
M/s.B.Mehta & Co., Union Bank
Bldg. Bombay Samachar Marg,
Fort, Bombay 400 001. .. Petitioner.

Vs.

1. Shri Ravindra Ishwardas
Sethna of Bombay,
residing at 535, Kalbadevi Road,
Bombay 400 002. ..
2. Shri Yogendra Ishwardas
Sethna of bombay,
residing at present at B-3,
University Terraces, 1510,
College Avenue, Manhattan,
Kansas 66502 ..
in the United States of
America, by his constituted
Attorney the first respondent
abovenamed Respondent.
3. Shri Pranjivandas Vithaldas
Vora of Bombay,
having his address at 69,
Mittal Chambers, Nariman Point,
Bombay 400 021 .. Respondents.

Mr.D.B.Shroff with Mr.S.Rustomjee i/b Pardiwala & Co. for the petitioner.
Mr.D.B.Savant i/b M/s.Ratilal Desai for respondent nos.1 and 2.

CORAM : D.B.BHOSALE, J.

DATED : 22ND SEPTEMBER, 2006

ORAL JUDGMENT:

. Heard learned counsel for the petitioner and the respondent.

2. The petitioner, in this writ petition under

Article 226 and 227 of the Constitution of India has challenged the order dated 20th February, 1995 by which the learned Judge of the City Civil Court has amended the judgment dated 29.4.1994 rendered in S.C.Suit No.4330 of 1978 filed by respondent nos.1 and 2 herein. The impugned order reads thus:

> "Mr.Borkar for Plaintiff.
> The decree passed in this suit shall be decree against the deft.no.2 only. The suit is already decreed against the deft.no.1 earlier, exparte. Accordingly the operative portion of the Judgment dt.29.4.94, shall stand amended."

3. The factual matrix that is relevant and necessary to appreciate the challenge in the instant writ petition is as follows: The petitioner and respondent no.3 who were defendant nos.1 and 2 respectively in S.C. Suit No.4330 of 1978, were appointed as the executors of the Will of one Smt. Laxmibai, wife of Kisandas Jagmohandas Mangaldas, who died on 20th December, 1968. Respondent nos.1 and 2, hereinafter referred to as the plaintiffs, who instituted the aforesaid suit, are nephews of the said Kisandas. The suit, against the petitioner and respondent no.3, hereinafter referred to as defendant no.1 and defendant no.2 respectively, was filed for recovery of an amount of Rs.35,470/- with interest and further sum of Rs.3,000/- for the reasons set out in the plaint. In the suit it is alleged that defendant no.1 and defendant no.2 had committed certain acts of

maladministration as executors of the will of Laxmibai and therefore, they be decreed and ordered to pay to the plaintiffs the aforesaid amount.

4. Admittedly, the suit was decreed exparte vide judgment and order dated 9.7.1982. One Mr.Parulekar, advocate who was representing both the defendants, however, took out a notice of motion for setting aside the exparte decree against defendant no.2 only. The trial Court made the Notice of Motion bearing No.3712/1982, filed on behalf of defendant no.2, absolute in terms of prayer clause (a) thereof and, accordingly, the decree against defendant no.2 stood set aside. Thereafter it appears that the suit proceeded on merits and it came to be disposed of vide judgment dated 29.4.1994. The operative portion of the judgment reads thus:

> "The suit is decreed as follows:-
> **The defendants shall pay Rs.5,000/- plus interest at the same rate as agreed upon by M/s.A.Vallabhdas & Co. on Rs.5,000/- from January 1968 till date and sum of Rs.1,000/- as funeral expenses to the Plaintiff.**
> **No order as to costs."**

5. A bare perusal of the operative portion and the text of the judgment clearly shows that the suit proceeded against both the defendants and in the course of hearing Mr.Parulekar, advocate represented them both. They both participated in the hearing of

the suit. The issues framed in the suit also do not separate both the defendants and similarly, even the decree is against both. The judgment thus clearly demonstrates that after setting aside the exparte decree dated 29.4.1994 only against defendant no.2, the suit proceeded against both the defendants as if the decree was set aside against them both. At no stage in the course of hearing of the suit after setting aside exparte decree dated 9.7.1982 till the suit was decreed on 29.4.1994 the plaintiffs made any grievance about participation of defendant no.1 in the suit. They did not object appearance of Mr.Parulekar for defendant no.1 also. Even the issues clearly show that the burden was put on the plaintiffs to prove that both the defendants were liable to pay the amount and whether they were entitled for decree against them both. It is thus clear that the trial Court while proceeding with hearing of the suit proceeded against both the defendants under the impression that the decree was set aside against both of them though technically it was set aside only against defendant no.2. It further appears and not disputed that the decretal amount with interest was paid to the plaintiffs and they accepted the same in October, 1994.

6. It is against this backdrop the plaintiffs

took out the Notice of Motion in Suit No.4330/1978 which, according to the learned counsel for the petitioner, was disposed of by the order impugned in the present writ petition, without issuing notice to defendant no.1. Mr.Savant, learned counsel for the plaintiffs, therefore, did submit that the impugned order may be set aside and the matter may be remanded to the City Civil Court for considering the said Notice of Motion afresh and decide it after hearing the parties concerned in the suit. I am not inclined to accede to the request made by Mr.Savant. The suit was filed in 1978. It was a recovery suit. The trial Court in the well reasoned judgment dated 29.4.1994 has clearly held that the defendants were liable to pay Rs.5,000/- only, plus interest to the plaintiffs. The decree has already been satisfied and against this backdrop I am inclined to allow this writ petition on merits as also in the light of the provisions of Order 9 Rule 13 of the CPC and in particular first proviso appended thereto.

7. Rule 13 of Order 9 of the CPC provides for setting aside decree exparte against the defendant. The first proviso appended to Rule 13 provides that where the decree is of such nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants

also. In the present case both the defendants, were appointed as the executor of the Will of Smt.Laxmibai and the decree was sought against them both. Mr.Savant, learned counsel for the respondents-plaintiffs, in response to my specific query, has fairly stated that both the defendants were equally liable to pay the amount claimed in the suit and the claim cannot be separated against them both. It is clear, their liability was joint and, therefore, it follows that while setting aside the decree against defendant no.2, one of the administrators of the Will, it ought to have been set aside against defendant no.1 also. Having regard to the provisions of Rule 13 Order 9 of the Code of Civil Procedure merely because the learned Judge, while setting aside the decree only against defendant no.2 vide order dated 8.9.1985, did not notice the aforesaid factual aspect and the provisions contained in Rule 13 Order 9 of the CPC, in any case, cannot be made a ground to make the parties to suffer any more. Indubitably, the claim of the plaintiffs against the defendants and the decree is indivisible. Moreover, after setting aside the decree dated 9.7.1982, the manner in which the hearing of the suit proceeded against both the defendants, the said exparte - decree deemed to have had been set aside against defendant no.1 also.

8. The petitioner is now 86 years old. This litigation is pending since 1978. The submission of learned counsel for the plaintiff that he accepted the decretal amount only from defendant no.2 and that they have every right to execute the decree dated 7.9.1982 against defendant no.1, therefore, must be rejected. He further invited my attention to the application filed by defendant no.1 for setting aside the decree dated 9.7.1982 and submitted that it further supports that the decree dated 26.12.1994 is only against defendant no.2. In reply to this submission Mr.Shroff, learned counsel for the petitioner invited my attention to the affidavit of defendant no.1 dated 26th December, 1994 filed in support of Notice of Motion No.7 of 1995 taken out for setting aside exparte decree dated 9.7.1982 against him. In the said affidavit defendant no.1 has stated that he has taken out the said motion as a matter of abundant caution and without prejudice to his rights and contentions to execution application no.327 of 1994. The facts and circumstances of the case clearly support the statement made by defendant no.1 in the said affidavit. I see no reason, to make defendant no.1 to prosecute and suffer any more the execution as also his own Notice of Motion No.7 of 1995. In the circumstances this writ petition is allowed. The order dated 20th February, 1995 is quashed and set

aside. Rule is made absolute in terms of prayer clause (a), (b) and (c). Prayer clause (a), (b) and (c) reads thus:

> "(a) that this Hon'ble Court be pleased to issue under Article 227 of the Constitution of India a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction calling for the records and proceedings of Suit No.4330 of 1978 from the City Civil Court, Bombay and after examining the legality, validity and propriety thereof the impugned order passed therein on 20th February, 1995 at Exhibit "E" hereto be quashed and set aside.
>
> (b) that this Hon'ble Court be pleased to declare that the order dated 8th September, 1982 setting aside the ex-parte decree against the Respondent No.3 be regarded as an order setting aside the entire ex-parte decree.
>
> (c) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction calling for papers and proceedings relating to the said Execution Application and after considering the legality, validity and propriety thereof be pleased to quash and set aside the same."

. No order as to costs.

(D.B.Bhosale, J.)